SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted]

SAM THOMPSON, - - - - - - Petitioner,

versus

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - Respondents.

On Petition For a Writ of Certiorari to the Police Court of the City of Louisville.

BRIEF FOR RESPONDENTS IN OPPOSITION.

WILLIAM E. BERRY,
Director of Law,
HERMAN E. FRICK,
Assistant Director of Law,
ROBERT L. DURNING,
Assistant City Attorney,
Attorneys for City of Louisville.

JO M. FERGUSON,
Attorney General,
WM. E. ALLENDER,
Assistant Attorney General,
Attorneys for Commonwealth of Kentucky.

May, 1959.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

	PAGE
Citations	i
Opinions Below	1
Jurisdiction	2
Argument on Jurisdiction	2
Questions Presented	6
Analysis of Record	8
Conclusion	12
Appendix	15

CITATIONS.

Cases:

	PAGE
Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 405	3
Young v. *Racen*, 337 U. S. 235, 93 L. Ed. 1333, 69 S. Ct. 1073	3
Childers v. *Stephens*, Ky., 320 S. W. 2d 797	3
Weintraub v. *Murphy*, Ky., 240 S. W. 2d 594	3
Anderson v. *Buchanan*, 292 Ky. 810, 168 S. W. 2d 48	4
Walters v. *Fowler*, Ky., 280 S. W. 2d 523	5

Statutes:

62 Stat. 929 (1948), 28 U. S. C. A. § 1257 (1949)	2
KRS 26.080	3
Kentucky Constitution § 110	3

Supreme Court of the United States

October Term, 1958.

No. 884

SAM THOMPSON, - - - - - - *Petitioner,*

v.

CITY OF LOUISVILLE and
COMMONWEALTH OF KENTUCKY, - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE POLICE COURT OF THE CITY OF LOUISVILLE.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

Directly, petitioner is seeking a review of two separate judgments of the Louisville Police Court as follows:

(1) A judgment of conviction on a loitering charge on February 3, 1959, imposing a $10.00 fine.

(2) A judgment of conviction on a disorderly conduct charge on February 3, 1959, imposing a $10.00 fine.

Indirectly, petitioner is attempting to have reviewed two earlier convictions by the Louisville Police Court carefully selected from his record of more than 54 arrests (Pet. App. C, p. 31).

There are no written opinions in these two cases directly involved, nor in the two indirectly involved. In view of the fact that the average annual docket of the Louisville Police Court is more than 25,000 cases, the Police Court has neither the time nor the facilities for handing down written opinions.

However, these cases were collaterally examined in habeas corpus proceedings in which the Circuit Court rendered an opinion granting a writ of habeas corpus, and was later reversed in an opinion by the Kentucky Court of Appeals (Pet. App. B, pp. 29 and 35).

JURISDICTION.

Petitioner is seeking a review by the Supreme Court of the United States direct from the Police Court of the City of Louisville, on the theory that he has no further remedy in the judicial system of Kentucky. The Respondents seriously question this premise.

ARGUMENT ON JURISDICTION.

One of the basic requirements of Supreme Court jurisdiction to review a judgment or decree of a state court, is the exhaustion of judicial remedies in the state court. This principle is implicit in the language of 62 Stat. 929 (1948), 28 U. S. C. A., § 1257 (1949), which reads:

> "Final judgments or decrees rendered by *the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court as follows: . . ." (Italics ours.)

Therefore, if Petitioner in this case has any judicial recourse in the courts of Kentucky, this Court should not be asked to extend jurisdiction over this litigation. *Mooney* v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406; *Young* v. *Ragen*, 337 U. S. 235, 93 L. Ed. 1333, 69 S. Ct. 1073.

It is true, as stated in the Petition for Certiorari that there is no statutory appeal from the Louisville Police Court where the fine is less than twenty dollars. KRS 26.080.

However, Kentucky, as other states, has a provision for extraordinary remedies. In Kentucky there is a constitutional grant of control to the Kentucky Court of Appeals over other courts in the Commonwealth. This authority is contained in Section 110 of the Kentucky Constitution, which reads as follows:

> "§ 110. JURISDICTION OF COURT OF APPEALS; CONTROL OF INFERIOR COURTS. The Court of Appeals shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law. Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

Under this section, the Kentucky Court of Appeals through extraordinary writs, may control an inferior Court of this Commonwealth which is proceeding erroneously within its jurisdiction. *Childers* v. *Stephens*, Ky., 320 S. W. 2d 797; *Weintraub* v. *Murphy*, Ky., 240 S. W. 2d 594.

Certainly it would be an anomalous situation for a state court of last resort to be powerless to protect the Constitutional rights and privileges of its citizens. Indeed, our Court of Appeals removed all doubt in *Anderson* v. *Buchanan*, 292 Ky. 810, 168 S. W. 2d 48, where it stated, 168 S. W. 2d at p. 52:

> "The arm of justice in Kentucky ought not to be any weaker or shorter than it is in the Federal courts. Our State Constitution also insures every person a 'remedy by due course of law' for an injury done him in his person. Sec. 14. And we have already recognized that the writ of coram nobis is a part of our 'due course of law.' As stated in Hysler v. Florida, supra [315 U. S. 411, 62 S. Ct. 691, 86 L. Ed. 932]: 'This common law writ, in its local adaptation, is Florida's response to the requirements of Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process. See Lamb v. [State of] Florida, 91 Fla. 396, 107 So. 535; Skipper v. Schumacher, 124 Fla. 384, 169 So. 58; Jones v. [State of] Florida, 130 Fla. 645, 178 So. 404.' The Supreme Court held that 'Such a state procedure of course meets the requirements of the Due Process Clause.'"

Essentially, in Kentucky jurisprudence where there is no statutory relief by appeal, a proceeding under Section 110 of the Kentucky Constitution turns upon a factual determination by the highest court as to

whether or not the circumstances of that particular matter will work such an irreparable injury as to warrant interference and supervision of the inferior court by our Court of Appeals. Most of the cases cited by the Petitioner (Pet., pp. 20-21) are ones in which there was no appeal and there was no clear showing of irreparable injury. For example, in *Walters* v. *Fowler,* Ky., 280 S. W. 2d 523, the court found the evidence sufficient to dispel the contention that irreparable injury would result from payment of a five dollar fine.

However, in the instant litigation, no application under Ky. Const. § 110 was made by the Petitioner to the Kentucky Court of Appeals. The Kentucky Court of Appeals has never been directly asked to pass on the merits of the Petitioner's conviction by the Louisville Police Court. It is rank speculation to assume that the Kentucky Court of Appeals would deny an application under Section 110, finding that the instant case was not of an extreme nature and would not work irreparable injury to the Petitioner. As a practical matter, in the ancillary proceedings in this case for a writ of habeas corpus in the nature of a stay of execution (Pet. App. B), our Court of Appeals did consider this matter an extreme case and granted relief which had not been specifically asked under Ky. Const. § 110.

It is an axiom of logic that the greater includes the lesser. If our Court of Appeals considered the ancillary proceedings an extreme case, requiring its intervention under Section 110, certainly it would con-

sider an application under Section 110 on the principal proceedings, as an extreme case.

Petitioner gave our Court of Appeals no opportunity under Section 110 to protect the privileges and immunities which he now claims have been infringed by the Louisville Police Court.

QUESTIONS PRESENTED.

Respondents believe that the petitioner has not made a fair presentation of the questions for consideration by the Supreme Court. It will be noted that the keystone of the petitioner's case is the assumption (which we emphatically insist is unfounded) that the petitioner was arrested and found guilty by the Louisville police Judge solely because he retained counsel.

It should be observed that whatever constitutional rights of the petitioner might have been infringed in the cases arising out of his prior arrest in the bus station involving the witnesses, Officer Suter and Alma Ford, are not before the Court in this matter. In that case petitioner has already obtained a reversal of his conviction (Pet., p. 8, footnote) and may pursue his civil cause, if any, against Officer Suter.

When all irrelevant testimony of the Suter arrest is stripped from this petition for certiorari, there is not a shred of evidence of reprisal by the Louisville Police or the Louisville Police Judge in the two cases before this Court. The only evidence, if such it may be called, relating to reprisal in this case, may be found in the avowal of Sam Thompson, prepared by

his attorney, and appearing as Exhibit E on Page 69 of Appendix C of the petition for certiorari. Even this avowal deals with the statement of Officer Suter in the prior cases which are not before this Court, and from the vulgar nature of which, Sam Thompson and his attorney infer the reprisal for retaining counsel. The proof in this arrest is all to the contrary as the record shows that the arresting officer (Lacefield) not only did not know Thompson before his arrest (Pet. App. C, p. 10) but did not learn of his previous arrest until after petitioner's arrest in this case (*ibid*, p. 11).

Since we deny vehemently that the petitioner in the two cases before the Court was arrested and convicted as a reprisal for employing counsel, we feel that the questions presented on page 3 of the petition for certiorari are irrelevant.

Therefore as to the first question, we agree that a conviction solely as reprisal for employment of counsel violates the due process clause of the Fourteenth Amendment.

The second question is easily answered. Kentucky, by Section 110 of its Constitution, does provide judicial process whereby Federal Constitutional questions can be adjudicated in cases such as those presently before the Court. As demonstrated by the language of the Kentucky Court of Appeals in the case of *Anderson* v. *Buchanan, supra,* it is clear that our courts are as solicitous of the rights of individuals as any federal court.

As to the third question presented by the petitioner, this question is likewise answered by Section 110 of the Kentucky Constitution and the case of *Anderson* v. *Buchanan, supra.*

As to the fourth question presented by the petitioner, we believe this question is completely improper in that the premise of the question is not a part of the record; namely, that the arrests in the two cases before the Court were made in reprisal for petitioner's insistence on his right to retain counsel.

As nearly as we can determine, the two cases before the Court present solely the question of whether a former arrest grants immunity from arrest for any subsequent unlawful activities.

ANALYSIS OF RECORD.

As all triers of fact, Judge Taustine of the Louisville Police Court, in the trial of Sam Thompson, on February 3, 1959, was faced by a conflict of testimony. After a full hearing, in which the accused was very competently represented by counsel, the Judge accepted the testimony of the arresting officer as true and failed to believe the testimony of the accused. We believe the following excerpts from the record amply demonstrate the propriety of Judge Taustine's action in failing to believe Sam Thompson. These references to the record will be to the pages in Appendix C of the petition for certiorari wherein the transcript of the proceedings appear.

1. Petitioner claimed he was not dancing at the time of his arrest, but patting his foot (p. 21).

Officer Lacefield testified petitioner was dancing by himself when he entered the saloon (p. 2).

Mr. Marks, the Manager of the Liberty End Cafe, was called as a witness for the defendant, Sam Thompson. On cross-examination he admitted that Sam Thompson was doing a shuffle dance (p. 27).

Who was telling the truth, Officer Lacefield or Sam Thompson?

2. The witness Marks, Manager of the Cafe, said he had not sold any beer or anything to eat to Sam Thompson (pp. 25 and 26).

Thompson testified he bought one glass of beer and a dish of macaroni in that place (p. 19). He was uncertain whether a fellow named Bob or a waitress had served him (p. 19). Even though Thompson had not been in the Cafe since his arrest (p. 22), he did not remember the significant fact as to who had waited on him. Marks, the defendant's own witness, testified the waiter could not have served Thompson because he was washing dishes in the back (p. 30). The waitress did not testify (p. 30).

Marks on cross-examination stated he had been on the premises the whole time Thompson was there and did not see him eat or drink anything (p. 28).

In view of the foregoing does it appear that Thompson truthfully stated he had a beer and a dish of macaroni prior to his arrest?

3. Officer Lacefield testified that Thompson was very argumentative and argued with the arresting officers (pp. 2 and 3).

Thompson testified there was no argument at the time of his arrest (p. 24).

There was no other testimony on this point.

In addition to the foregoing conflicts in testimony, there is the complete implausibility of petitioner's story.

Petitioner claims he was wating for the bus in the Liberty End Cafe at 342 East Liberty Street (pp. 2, 19).

The rear end of the Liberty End Cafe is closer to the coach stop, where petitioner's bus would have stopped, than the front of the Cafe (p. 5). The nearest bus stop is half a block from the Liberty End Cafe (p. 6). For the convenience of the Court a plat of the Cafe and bus stop is shown in Appendix A of this Brief in Opposition.

Petitioner, by his own proof, could have caught either the Buechel Bus Company bus or the Blue Motor Coach bus. Each of these left its terminal at 6:15 P.M.

The Blue Motor Coach terminal is at 213 West Liberty Street (Pet. App. C, Exhibit D). The terminal of the Buechel Bus Company was at 318 West Liberty (although this does not appear in the record).

Therefore, these buses had to proceed either four and one-half or five and one-half blocks after leaving the terminal before arriving at the coach stop where

petitioner planned to catch the bus. The time of arrival at this coach stop must have been some minutes after leaving the terminal at 6:15 P.M.

Let us determine where petitioner was at the time the earlier bus was due at his coach stop.

Petitioner was arrested at 6:53 P.M. in the Liberty End Saloon (p. 1). Petitioner had been on the premises some thirty or thirty-five minutes prior to the arrival of the police (pp. 2, 25). Thompson talked to the arresting officer from five to seven minutes prior to his arrest (p. 24).

When these times are deducted from the time of arrest, it is found that Thompson entered the Liberty End Saloon sometime between 6:11 and 6:18 P.M. Meantime both of his buses had left their terminals either four and one-half or five and one-half blocks away at 6:15 P.M. An additional half a block away, dancing in a saloon, Thompson was waiting for either bus.

In evaluating the foregoing testimony, there was no violation of petitioner's constitutional rights in the failure of the police judge to believe petitioner. Every feature of his story which would be checked against other testimony was at variance with that testimony. The part of his story which could not be directly checked, namely, about waiting for a bus in a bar room, is not only implausible, but mathematically unsound.

It is an old principle of Anglo-American law that testimony *falsus in uno, falsus in omnibus.*

The police judge, having discovered certain falsities in petitioner's testimony was certainly warranted in believing the testimony of Officer Lacefield.

CONCLUSION.

The foregoing discussion reveals that petitioner in this case is, at best, premature in his application to the Supreme Court for relief, since he has given the Kentucky Court of Appeals no opportunity under its constitutional authority to review the alleged irreparable injury done to him by the Louisville Police Court.

Furthermore, the petition for certiorari reveals that the true complaint of the petitioner concerns his arrest by Officer Suter on January 14, 1959 (tried January 20, 1959); but this case is not before the Supreme Court. By indirection, petitioner seeks a sympathetic eye on the case being reviewed by physical incorporation of the extraneous January 20, 1959, proceedings. When these irrelevant proceedings are stripped from the petition for certiorari, all that remains is the conflict of testimony between the arresting officer and the accused. In view of the demonstrated falsity of some of the testimony of the accused, it was eminently proper for the Police Judge to choose to believe the testimony of the Arresting Officer, Lacefield, rather than the testimony of the accused.

Although the petition for certiorari claims directly, and not by innuendo, a gigantic scheme of the Louisville Police Force to seek reprisal against the accused,

the testimony in the case before this Court demonstrates that the arresting officer not only did not know the accused at the time of his arrest, but was not informed of the accused's other conflicts with the law until after the arrest.

For the foregoing reasons we submit that no meritorious federal question has been submitted to this Court and therefore the petition for certiorari should be denied.

Respectfully submitted,

WILLIAM E. BERRY,
Director of Law,
HERMAN E. FRICK,
Assistant Director of Law,
ROBERT L. DURNING,
Assistant City Attorney,
Attorneys for City of Louisville.

JO M. FERGUSON,
Attorney General,
WM. E. ALLENDER,
Assistant Attorney General,
Attorneys for Commonwealth of Kentucky.

May, 1959.

E. LIBERTY ST

342

LIBERTY END CAFE

BUS STOP

ST.

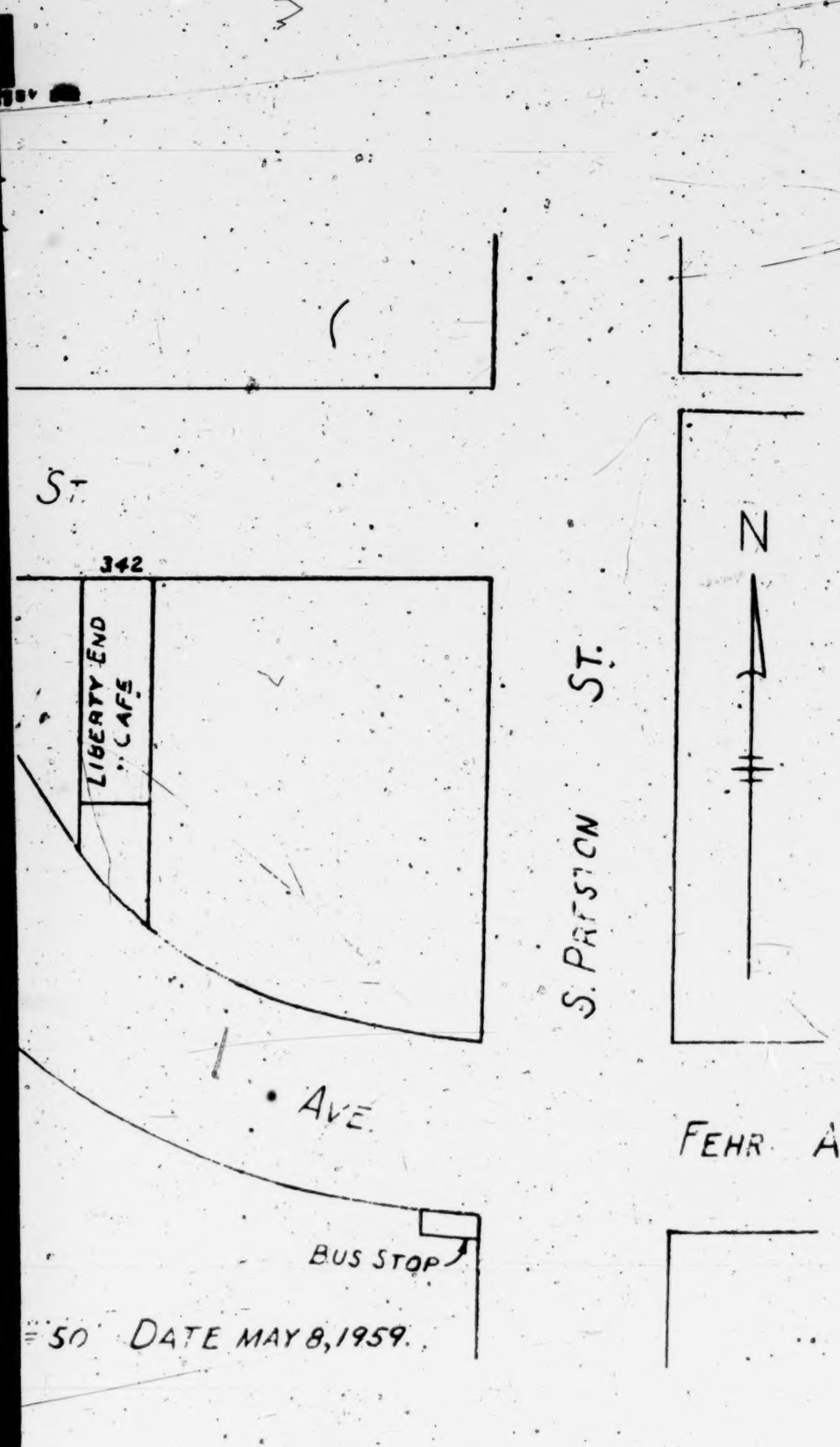
FEHR

AVE

S. FLOYD

BUS STOP

SCALE 1" = 50' DATE MAY 8, 1959.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LIBERTY END CAFE
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